

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KIMBERLY A. WALSH,)
)
)
Plaintiff,) Case No. 07cv1478
vs.)
)
DeVry, Inc., LONG TERM DISABILITY)
COVERAGE FOR ALL EMPLOYEES)
LOCATED IN UNITED STATES OF)
DeVry, Inc.; and PRUDENTIAL)
INSURANCE COMPANY OF AMERICA)
)
Defendants.)

**JOINT MOTION FOR ALTERNATIVE JUDGMENT PURSUANT TO RULE 52
OF THE FEDERAL RULES OF CIVIL PROCEDURE AND TO VACATE THE
CURRENT TRIAL DATE**

Plaintiff Kimberly Walsh (“Walsh”) and Defendants DeVry, Inc., (“DeVry”), Long Term Disability Coverage for all Employees Located in United States of DeVry, Inc. (“Plan”), and The Prudential Insurance Company of America (“Prudential”), jointly, by their undersigned attorneys, move this Honorable Court for an alternative judgment pursuant to Rule 52 of the Federal Rules of Civil Procedure and to vacated the current March 16, 2009 trial date, and in support state as follows:

1. The Parties have both moved for summary judgment. Pursuant to the Court’s February 2, 2009 order (Docket #115), the Court vacated several pre-trial dates but maintained the bench trial set for March 16, 2009 at 9:00 a.m. The Court also urged the Parties to consider and discuss settlement. Since then, the Parties have fully briefed their summary judgment motions, which are now pending before the Court.

2. The Parties have also engaged in ongoing good faith settlement discussions, which included a private mediation in January 2008. Most recently, upon the Court’s urging, the

Parties have continued to engage in settlement discussions. However, the Parties have now ceased settlement discussions as they continue to be drastically apart as to a settlement amount.

3. The Parties have also conferred regarding trial of this matter and have stipulated to a trial on the papers. As such, the Parties jointly request that in the event that both pending motions for summary judgment are denied, the Court rule on this matter pursuant to Rule 52 of the Federal Rules of Civil Procedure, so it may weigh the evidence and enter findings of fact and conclusions of law.

4. This Court has held that this approach is appropriate when reviewing ERISA claims in accordance with precedent from the Seventh Circuit as well as from other circuits. *See, Marshall v. Blue Cross Blue Shield Ass'n*, 2006 U.S. Dist. LEXIS 68956, *2-6 (N.D. Ill. Sept. 13, 2006) (Filip, J.); see also, *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (deciding, in an ERISA case, that the applicable standard of review was the one found in Rule 52(a), where the parties stipulated to the facts that made up the administrative record, and “the procedure the parties followed . . . [was] more akin to a bench trial than to a summary judgment ruling.”); accord *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094-1095 (9th Cir. 1999) (remanding ERISA benefits case to district court for a bench trial pursuant to Rule 52(a) on the record submitted to the plan administrator where there were disputed factual questions). The documents tendered by the Parties to the Court are admissible as a whole as a business record pursuant to Rule 803(6) of the Federal Rules of Evidence. *Traum v. The Equitable Life Assur. Society of the U.S.*, 240 F. Supp. 2d 776 (N.D. Ill. 2002).

5. The Parties also jointly request that this Court vacate the bench trial date set for March 16, 2009.

WHEREFORE, Plaintiff KIMBERLY WALSH and Defendants DeVRY, INC., LONG TERM DISABILITY COVERAGE FOR ALL EMPLOYEES LOCATED IN UNITED STATES OF DeVry PLAN and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA respectfully request that this Honorable Court grant their Joint Motion for an Alternative Judgment Pursuant to Rule 52 of the Federal Rules of Civil Procedure and to Vacate the Current March 16, 2009 trial date.

Dated: March 5, 2009

Respectfully Submitted,

KIMBERLY WALSH,

**THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA**

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to the following party by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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